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FILED
Clerk
District Court

MAR 16 2006

For The Northern Mariana Islands
By _____
(Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

JIN CHUN HU,

Plaintiff,

vs.

ISLAND SEVEN COLORS, INC.,
KIM CHANG RYEOL and DOE I,

Defendants.

) CIVIL CASE NO. 05-0030

)
)
) **REPLY TO PLAINTIFF'S**
) **OPPOSITION TO MOTION TO**
) **DISMISS**

)
)
) Judge: Munson
) Date: March 30, 2006
) Time: 9:00 AM

I

PLAINTIFF CAN PROVE NO SET OF FACTS
IN SUPPORT OF CLAIM THAT WOULD
ENTITLE HIM TO RELIEF UNDER 29 U.S.C. §207

The plaintiff argues that the motion of the defendants should be treated as one for summary judgment, and he should be given the opportunity to conduct discovery citing *Celotex Corp. v. Catrett*, 106 S Ct 2548, 477 US 317, 91 L. Ed. 2d 265 (1986), which states:

Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued if the moving party has not had an opportunity to make full discovery.

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3 106 S Ct at 2554, 477 US at 326, 911 L Ed2d at 276. But the plaintiff fails to mention that
4 Rule 56(f) requires him to state in his affidavit the reasons why he cannot present essential
5 facts to justify his opposition to the defendants' motion. The plaintiff has not done so. He
6 cannot now expect that the court will deny the defendants' motion to dismiss to give him the
7 opportunity to make discovery.

8 It is also surprising that the plaintiff would even commence an action of this kind
9 without any knowledge of facts that would entitle him to seek relief under 29 U.S.C. §207.
10 Such knowledge would have been easy to state since he was aware as to the kind of work he
11 was doing for the defendants. Indeed, the plaintiff admits that "it is the activities of the
12 employee and not those of the employer that are determinative" in determining whether he was
13 employed in commerce, in the production of goods for commerce, or in an enterprise engaged
14 in commerce or in the production of goods for commerce. Page 5 of Plaintiff's Opposition.

15 Assuming that the court will convert this motion to a motion for summary judgment,
16 the affidavit of Kim, Chang Ryeol clearly shows that the plaintiff did not perform any kind of
17 work that could be construed as engaging in commerce or in the production of commerce.¹

18 The plaintiff cites *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th
19 Cir. 2002) for the proposition that a complaint should not be dismissed unless it appears
20 beyond doubt that the plaintiff can prove no set of facts in support of the claim that would
21 entitle the plaintiff to relief. Based on his opposition, the plaintiff has shown that he can prove
22 no set of facts in support of his federal claim under 29 U.S.C. §207. First, he failed to plead a
23 set of facts that would sustain his conclusory statement that he was employed in commerce or
24 in the production of goods for commerce. Second, he failed to show by counter-affidavit that

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¹ The plaintiff has conceded that the plaintiff did not work in an enterprise that engaged in
commerce or in the production of goods for commerce. Our argument will just focus on the
question of whether the plaintiff was employed in commerce or in the production of goods for
commerce.

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3 there is a set of facts from which he can infer that he was engaged in commerce or in the
4 production of goods for commerce.

5 However, since *Van Buskirk* speaks of probability or even possibility of whether the
6 plaintiff can prove any set of facts that will entitle him to federal relief, let us analyze the
7 plaintiff's theory stated on page 7 of his Opposition. He states as follows:

8 ... It is extremely likely that Plaintiff's duties included assisting tourists with
9 film development, assisting aliens with photos for employment in the
10 Commonwealth, assisting aliens with photo development which photos were
11 taken or sent to locations outside the Commonwealth, assisting residents
12 with development of film from vacations, tours, trips, and business outside
13 the Commonwealth, or any number of related activities, all of which are
14 engaging in interstate and foreign commerce, and the production of goods
15 for interstate and foreign commerce.

16 The plaintiff has failed to create a genuine issue of material fact by failing to file an affidavit in
17 opposition to Defendant Ryeol's affidavit. So, Mr. Kim's statement that "Island Seven Colors,
18 Inc. never had any contract or agreement with any manufacturer or processor of the
19 manufacturing of any photographs or any other product, developed by Island Seven Colors,
20 Inc, nor did Jin Chun Hu ever developed any photographs for any manufacturer or processor
21 of developed photographs" must stand as an undisputed fact. The possibility that is open to
22 the plaintiff's theory is that he assisted by cleaning the film developing machine and cutting the
23 photographs. We should therefore consider the possibility (a) that tourists may have come to
24 Island Seven Colors, Inc. to have their film developed, (b) alien workers may have also come
25 to the defendants' shop to have their film developed for employment in the Commonwealth or
26 even to have their photos taken for employment purposes, (c) aliens who had their film
developed may have sent their photographs to locations outside the Commonwealth, and (d)
residents might have come from a business trip or vacation trip and took pictures there and
then had their films developed in the defendants' shop.

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3 Assuming without admitting that the plaintiff can prove this theory with evidence and
4 assuming further that the plaintiff did assist in the film development by cutting the photos or
5 cleaning the film developing machine, the question is: does any of these possible scenarios
6 implicate the plaintiff in the doing of an act in commerce or in the production of goods for
commerce?

7 The plaintiff cites *Wirtz v. Durham Sandwich Company*, 367 F2d 810, 812 (4th Cir.
8 1966) where employee that received between eleven and twenty-three shipments from across
9 state lines each month met the FLSA standard, despite spending only one-half hour per week
10 on such tasks. This case and all other cases like it do not support any of the plaintiff's
11 proposed facts. The shipments from across state lines were goods that were produced for
12 commerce. A tourist is not goods produced for commerce nor is he/she by definition of his/her
13 status engaged in commerce. The film that a tourist or a Commonwealth resident uses for
14 his/her camera is not goods for commerce. See 29 U.S.C. §203(l) which excludes goods "after
15 their delivery into the actual possession of the ultimate consumer thereof other than a
16 producer, manufacturer or processor thereof." The tourist, who buys a film for purposes of
taking pictures of the scenery which he has visited, is an ultimate consumer.

17 Thus, when a tourist buys a film, the film he buys is no longer goods for purposes of
18 determining whether his activity constitutes engagement in the production of goods for
commerce.

19 Since a tourist is not engaged in the production of goods for commerce, the
20 development of his film into photographs is not a consequence of his activity in the production
21 of goods for commerce or engaging in commerce. Unlike in *Wirtz*, where the employee
22 received goods produced in commerce, the defendants' shop received goods that were not
23 deemed as goods produced in commerce, because they had already been delivered to the
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3 ultimate consumer - the tourist. Thus, it makes no difference whether or not the plaintiff helped
4 in receiving the film to be developed for the tourist.

5 Now, with respect to the film that is developed by the defendants' shop with some
6 assistance by the plaintiff, is the development of the film into photographs goods for interstate
7 or foreign commerce? Assuming again, that the plaintiff can prove that once the film is
8 developed, the customer then sends his photograph to his relatives and friends in his home
9 country or home state. Again, the definition of goods does not include goods after their
10 delivery to the ultimate consumer. Since Mr. Kim's affidavit specifically shows that the shop
11 never had any contract or agreement with any producer, manufacturer or processor for the
12 reproduction of the photographs it develops in the CNMI, the ultimate consumer that can be
13 allowed in the plaintiff's theory has to be somebody who is not a producer, manufacturer or
14 processor of the photographs produced by the defendants' shop. Therefore, whatever the
15 ultimate consumer does with his photograph after it is delivered to him is no longer goods
16 produced for commerce.

17 The plaintiff also cites 29 C.F.R. §779.116 which states:

18 Custodial and maintenance employees who perform maintenance and
19 custodial work on the machinery, equipment, or premises where *goods*
20 *regularly are produced for commerce* or from which *goods* are regularly
21 shipped in interstate commerce are engaged in covered activities.

22 Because what the defendants' shop developed for the ultimate consumer are not goods
23 produced for commerce, 29 C.F.R. §779.116 does not apply in this case, even if we assume
24 that the plaintiff helped clean the film developing machine of the defendants' shop.

25 In conclusion, it is clear that the plaintiff can prove no set of facts that he was
26 employed in commerce or in the production of goods for commerce.

II

LACK OF FEDERAL QUESTION JURISDICTION

REQUIRES THE DISMISSAL OF THE PLAINTIFF'S COMPLAINT

This motion to dismiss, or if the court so prefers, a summary judgment to dismiss, is based on the court's lack of federal question jurisdiction by reason of the fact that 29 U.S.C. §207 does not apply, and therefore the plaintiff has no federal claim upon which relief can be granted. The courts have in many cases dismissed a complaint filed with a federal court for lack of federal question jurisdiction. See *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 US 804, 92 L Ed 2d 650, 106 S Ct 3229 (1986), (ruling that the district court had no federal question jurisdiction over the claim of the plaintiff); *Gully v. First Nat. Bank in Meridian*, 299 US 109, 57 S Ct 96 (1936).

As argued above, 29 U.S.C. §207 does not apply in the instant case, because the plaintiff was not employed in commerce, or in the production of goods for commerce, or in an enterprise engaged in commerce or production of goods for commerce. Thus, the plaintiff's complaint does not state a federal claim upon which relief can be granted.

This court should dismiss the plaintiff's complaint for lack of jurisdiction over the subject matter.

Dated this 16th day of March, 2006.


REYNALDO O. YANA

Attorney for the Defendants